

the 14 day of October 03
TESTE: LILLIE M. HART, CLERK 10:15am
By 1541 D.C.

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF CHESAPEAKE

COMMONWEALTH OF VIRGINIA)	
)	
v.)	CRIMINAL No. CR 03-3089,
)	CR 03-3090, CR 03-3091
LEE BOYD MALVO)	

COMMONWEALTH'S OPPOSITION TO DEFENDANT'S MOTION FOR VIDEO CONFERENCING

Comes Now the Commonwealth of Virginia by her Commonwealth's Attorney and opposes the Defendant's Motion for Video Conferencing for the following reasons:

1. The use of video conferencing will not save the Commonwealth of Virginia any money and will likely increase the already huge amount of taxpayer dollars spent by Malvo's lawyers in this case. Professor Lederer reports that the cost of video conferencing at this point should be roughly equal to the cost of bringing the witnesses to the courtroom to testify. But he states that the cost of video conferencing can not be determined with absolute certainty at this time and in any event may exceed his current best estimate. For instance, he notes that per minute charges for cable lines from Jamaica estimated at between \$4.50 to \$5.00 may double to \$9.00 per minute depending upon other variables. In addition, Professor Lederer has indicated that his numbers do not include the cost of having a neutral person present at the remote sites to monitor the proceedings. The present budget estimate for video conferencing also lacks funds for the Commonwealth to send a representative to each of the sites. When these additional costs are added in the price of video conferencing

will exceed the expense of conducting the examination of these witnesses in the time honored fashion.

2. This Court has on occasion rightfully expressed its concern that all expenses incurred by Malvo's lawyers in this case be necessary and reasonable. Malvo estimates that he intends to call approximately 25 witnesses through video conferencing at a price at best equal to the cost of flying these witnesses to Chesapeake for the trial. How can this Court determine whether the expenses for these witnesses are either reasonable or necessary without some proffer from Malvo as to the nature of the expected testimony? It cannot. If most of these witnesses will be called to cumulatively and repetitively testify that Malvo was, for example, a nice boy when he was in first grade, second grade, etc., then the taxpaying public should not foot the bill.

The right to compulsory process is not absolute. U.S. v. Valenzuela- Bernal, 458 U.S. 858, 873 (1982) (compulsory process not violated by deportation of potential defense witnesses who were illegal aliens because defendant failed to show lost testimony would have been material, favorable, and not merely cumulative); see also United States v. Mount, 896 F 2d. 612, 621 (1st Cir. 1990) (compulsory process not violated when court refused to pay witnesses' travel expenses because defendant failed to demonstrate that testimony would have been relevant, material, and favorable)

At a minimum, this Court should conduct an inquiry to determine whether the anticipated testimony of these witnesses is cumulative. If the proffered testimony is cumulative it should be excluded. Harrison v. Commonwealth, 244 Va. 576 (1994)

(exclusion of cumulative evidence is in the sound discretion of the trial court);

Proctor v. Colonial Beach, 18 Va. App. 28 (1994) (cumulative evidence merely

restates what has already been said and adds nothing to it); Massey v.

Commonwealth, 230 Va. 436 (1985) (where evidence is merely cumulative its

introduction may be limited by the court).

3. The use of video conferencing in this case makes possible a number of problems which could undermine the integrity of the trial. Suppose a witness is called to the screen and engages in contemptuous conduct, or defies a ruling of the Court? The Court's admonishments may be of little consequence to a witness in a foreign country who is inclined to disregard them. Certainly the Court's contempt powers would be unenforceable and therefore useless against such a witness.

Even if the Commonwealth were to send a representative to each of the remote sites he would have no legal authority to act to correct any impropriety. In a traditional courtroom setting the trial Judge can control the witnesses and spectators to prevent inappropriate gestures, signals or communications to witnesses. If witnesses are permitted to testify on television from foreign jurisdictions the court surrenders its ability to exercise its customary control over the proceedings. All mischief imaginable may occur without the Court's knowledge. The rule on witnesses would be particularly vulnerable under such circumstances. The ability to effectively subject a witness to recall will be lost as well.

4. The jury's ability to consider the demeanor of the witnesses on the stand will be compromised by the video conferencing process. The television witness who appears to be looking the cross examiner in the eye is in reality contemplating an

impersonal camera lens. On the other hand, should the witness allow his gaze to stray from that camera lens, the jury will be left guessing what the witness is looking at and why, with no possible way of knowing. A gaze averted and a gaze diverted are two different things, and the jurors are entitled to know the difference particularly in the case of a material witness.

One thing is certain; Malvo's television witnesses will never have to look the jury in the eye while they testify. Under the circumstances in this case the jury should be afforded the opportunity to consider the demeanor of witnesses on the stand, in the dignified and morally compelling atmosphere of the courtroom.

5. The Court itself, at an earlier hearing, pointed out that one study revealed that jurors are more persuaded by television witnesses than by those who testify in person. If this study has any validity it is another reason for this Court to reject video conferencing in this case. Neither side should be permitted to gain an advantage as to the perceived credibility of some of its witnesses through the use of televised testimony.

6. Video conferencing will impair the Commonwealth's ability to cross examine defense witnesses as effectively as it might in a traditional trial. The unique dynamics of the courtroom setting which contribute to the search for the truth will be absent with respect to witnesses who testify from hotel rooms.

7. When the Court *sua sponte* raised the possibility of video conferencing it appeared to be considering employing it with respect only to sentencing witnesses who might not be subject to much, if any, cross examination. But Malvo's counsel has conceded that some of its approximately 25 proposed television witnesses are fact

witnesses rather than sentencing witnesses. Moreover Malvo's belated notice of intent to pursue an insanity defense further complicates the matter. Although the Commonwealth has still not received the defendant's report with respect to sanity at the time of the offense it is likely that the report may generate a need for a more extensive cross examination by the Commonwealth of many of Malvo's witnesses.

Respectfully submitted,

RAYMOND F. MORROGH
Deputy Commonwealth's Attorney

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Commonwealth's Opposition was mailed, postage prepaid, and faxed to Michael Arif, Counsel for Defendant, 8001 Braddock Road, # 105, Springfield, Virginia 22151 and Craig Cooley, Counsel for the Defendant, 3000 Idlewood Avenue, P.O. Box 7268, Richmond, Virginia 23221 this 15th day of October, 2003.

RAYMOND F. MORROGH
Deputy Commonwealth's Attorney